Supreme Court, U.S.
FILED
MAY 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1551

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ALAN J. KARCHER, *et al.*,
Appellants,

v.

JEFFREY MAY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS

DAVID S. TATEL
WALTER A. SMITH, JR.*
ELIZABETH B. HEFFERNAN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
Counsel for
American Association of School Administrators

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
Moment-of-Silence Statutes Such As The New Jersey Statute Operate In The Classroom As A State Endorsement Of Prayer	5
A. The Court's Assumptions In *Wallace v. Jaffree*	5
B. Classroom Perception Of Moment-of-Silence Statutes	8
C. Classroom Effects Of Moment-Of-Silence Statutes	14
CONCLUSION	18

TABLE OF AUTHORITIES

Cases: Page

Abington School District v. Schempp, 374 U.S. 203 (1963) ..... *passim*

Bender v. Williamsport Area School District, 106 S. Ct. 1326 (1986) 3

Duffy v. Las Cruces Pub. Schools, 557 F. Supp. 1013 (D.N.M. 1983) 6, 14, 16

Engel v. Vitale, 370 U.S. 421 (1962) ..... *passim*

Illinois ex rel. McCollum v. Board of Educ., 333 U.S. 203 (1948) 16

Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982) 8

Lynch v. Donnelly, 465 U.S. 668 (1984) 6

May v. Cooperman, 572 F. Supp. 1561 (1983), *aff'd*, 780 F.2d 240 (3d Cir. 1985), *juris. postponed sub nom. Karcher v. May*, 107 S. Ct. 946 (U.S. Jan. 27, 1987) (No. 85-1551) 16

Stone v. Graham, 449 U.S. 39 (1980) (per curiam) 14

Tilton v. Richardson, 403 U.S. 672 (1971) 13

Wallace v. Jaffree, 472 U.S. 38 (1985) ..... *passim*

Walter v. West Virginia Bd. of Educ., 610 F. Supp. 1169 (D. W. Va. 1985) 16, 17

Legislative Sources:

Voluntary School Prayer Constitutional Amendment: Hearings on S.J. Res. 73 & S.J. Res. 212 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 1st Sess. 543 (1983) 2, 9, 12, 17

Proposed Constitutional Amendment to Permit Voluntary Prayer: Hearings before the Senate Comm. on the Judiciary on S.J. Res. 199, 97th Cong., 2d Sess. (1982) 9

Other Authorities:

AASA, *Religion in the Public Schools* (1986) 2, 15

Bureau of the Census, U.S. Dept. of Commerce, *Statistical Abstract of the United States: 1987* (107th ed.) 15

TABLE OF AUTHORITIES—Continued

	Page
Byrnes, *Life Skills in Solitude and Silence in the School*, 104 Educ. 96 (1983)	12
New York Times, March 2, 1984	13
New York Times, March 11, 1984	9, 13, 17
Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U.L. Rev. 364 (1983)	12
Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv. L. Rev. 1874 (1983)	9, 15
U.S.A. Today, April 3, 1987	9
Way, *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 W. Pol. Q. 189 (1968)	11
Wall Street Journal, March 5, 1984	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1551

ALAN J. KARCHER, *et al.*,
Appellants,

v.

JEFFREY MAY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

---

BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS

INTEREST OF AMICUS CURIAE

The American Association of School Administrators ("AASA") is the national professional organization for school district administrators and other educators in our nation's public schools. AASA's members include approximately 18,000 school district superintendents, other school district administrators, school principals and other building level administrators, and educational administrators from other local, regional, state, and national educational agencies. AASA's members are thus responsible

for the daily operation of our nation's diverse public school systems.

Throughout its history, AASA has been concerned with the relationship between religion and public schools. In 1964 AASA published its first edition of *Religion in the Public Schools*, offering guidelines to school administrators charged with implementing this Court's decisions regarding prayer and Bible reading in public schools. In a new edition of *Religion in the Public Schools*, AASA observed: "No institution in society has been asked to walk the constitutional 'tight rope' between the two Religion Clauses more frequently than the public schools." AASA, *Religion in the Public Schools* 7 (1986). Summarizing for its members the decisions of this Court concerning school prayer and moment-of-silence statutes, AASA stated:

> It is important to note that in neither the New York nor the Alabama case did the Supreme Court rule "voluntary prayer" unconstitutional. In fact, one of the main reasons the Court objected to both the spoken prayer in *Engel v. Vitale* and the silent prayer in *Wallace v. Jaffree* was they were not voluntary—there was the element of implied coercion that is inherent in any state-sponsored religious exercise.

Id. at 18.

In addition to advising its membership concerning these issues, AASA has publicly expressed its perspective on religion and the public schools at the federal level. Testifying before Congress in 1983 on prayer in the public schools, AASA observed that "prayer is a very personal experience and religion an individual matter. Mixing education and religion in the public schools of our diverse society is not . . . [a] sound practice . . . ." *Voluntary School Prayer Constitutional Amendment: Hearings on S.J. Res. 73 & S.J. Res. 212 Before Subcomm. on the Constitution of the Senate Comm. on the Judi-*

ciary, 98th Cong., 1st Sess. 543, 548 (1983) [hereinafter *Hearings*] (statement of Ira J. Singer).

Similarly, during this Court's October Term, 1984, AASA filed an amicus brief in *Bender v. Williamsport Area School District*, 106 S. Ct. 1326 (1986). Based on its members' experience, AASA opposed mandatory inclusion of religious activities in extracurricular programs of secondary schools as required by the Equal Access Act, Pub. L. No. 98-377 (1984). Brief of Amicus Curiae AASA, *Bender v. Williamsport Area School District*, No. 84-773. AASA explained that students "would be likely to perceive a message of state endorsement of such religious activities" and that despite the efforts of school officials, the resulting "school disruption and community strife would undermine the schools' educational program . . . ." *Id.* at 4.

Moment-of-silence statutes present similar concerns. AASA members have many years' experience with the operation of state laws calling for school prayer or moments of silence and will be charged with implementing the Court's decision in this case. For the reasons discussed below, AASA supports the judgments of the district court and court of appeals in this case, holding the New Jersey moment-of-silence statute unconstitutional.[1]

---

[1] This brief is submitted by AASA with the written consent of the parties, copies of which have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

In *Wallace v. Jaffree*, 472 U.S. 38 (1985), various Justices of this Court noted that, unlike state laws requiring prayer in public schools, a state statute calling only for a moment of silence at the beginning of each school day might well pass constitutional muster. The Justices indicated that the practical effect of these statutes would bear on their constitutionality.

These Justices assumed, and correctly so, that teachers may have legitimate pedagogical reasons for a moment of silence at various times during a school day. The Justices also assumed, however, that moments of silence held at the beginning of each school day pursuant to state law do not convey state encouragement of prayer.

The experience of our members teaches us that the latter assumption is false; instead, administrators, teachers, parents, and students understand moments of silence imposed by state legislatures as the legislatures' attempt to return prayer to the classrooms. Although state legislatures may cite reasons of pedagogy and accommodation of religion in support of the statutes, all of the moment-of-silence statutes were passed after this Court's decisions banning school prayer and are perceived as an effort to reintroduce it. The statutory moment of silence thus undermines the schools' efforts to respect in practice the constitutional freedoms they teach in formal lessons. In a society of increasing religious diversity, moreover, the statutory moment of silence not only may be offensive to some non-Christians, but also may subtly pressure non-Christians to conform to the Christian "norm." In practice, therefore, the moment-of-silence statutes serve to expand religious worship beyond the home, the church, and the soul of the individual worshiper—where it belongs—and inject it into public school programs—where it does not belong.

ARGUMENT

MOMENT-OF-SILENCE STATUTES SUCH AS THE NEW JERSEY STATUTE OPERATE IN THE CLASSROOM AS A STATE ENDORSEMENT OF PRAYER

A. The Court's Assumptions in *Wallace v. Jaffree*

In *Wallace*, the Court struck down an Alabama statute permitting a moment of silence for " 'meditation or voluntary prayer' " at the beginning of each school day. 472 U.S. at 59, 61. The three opinions invalidating the statute, however, implied that *other* moment-of-silence statutes—such as the one presented in this case—might not violate the Establishment Clause.

Thus, Justice Stevens' opinion for the Court in *Wallace* did not question the constitutionality of an Alabama statute requiring a moment of silence "for meditation" at the beginning of each school day. His opinion characterized such a statute as "merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence" and as being "quite different" from a statute whose intent was "to return prayer to the public schools." 472 U.S. at 59.

Justice O'Connor addressed the question more directly and at greater length. She noted, first, that the Alabama statute requiring a moment of silence "for meditation" had the effect of "facilitat[ing] voluntary silent prayer of students who are so inclined" and that "[t]he parties . . . concede the validity of this enactment." *Id.* at 67 (O'Connor, J., concurring in the judgment). More importantly, Justice O'Connor wrote separately "to explain why moment of silence laws . . . do not necessarily" have the "purpose and likely effect" of "endors[ing] . . . voluntary prayer" and may therefore be constitutional. *Id.*

The considerations that caused Justice O'Connor to assume that such statutes would not have the effect of endorsing prayer were that (1) "a moment of silence is

not *inherently* religious" and "*need not* be associated with a religious exercise"; (2) "a pupil who participates in a moment of silence *need not* compromise his or her beliefs"; (3) "[b]y mandating a moment of silence, a State does not *necessarily* endorse any activity that might occur during the period"; and (4) "there is *arguably* a secular pedagogical value to a moment of silence in public schools . . . ." *Id.* at 72, 73, 75 (emphasis added). Accordingly, Justice O'Connor concluded that "moment-of-silence laws in many states *should* pass Establishment Clause scrutiny because they do not favor the child who chooses to pray . . . over the child who chooses to meditate or reflect." *Id.* at 76-77 (emphasis added).

She added, however, that the final determination of the constitutionality of these statutes presents a mixed question of fact and law and that, consequently, two kinds of information affect the determination: "evidentiary submissions" regarding the implementation of the statute; and an analysis of whether "an objective observer, acquainted with the text, legislative history, and implementation of the statute, *would perceive it* as a state endorsement of prayer in public schools." *Id.* at 76 (emphasis added).[2] Such information is to be used by the Court to resolve "[t]he crucial question . . . whether the State has conveyed or attempted to convey the message that children should use the moment of silence for prayer." *Id.* at 73 (footnote omitted).

Finally, in his concurring opinion in *Wallace*, Justice Powell "agree[d] fully with Justice O'Connor's assertion that some moment-of-silence statutes may be constitu-

---

[2] *See also Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (considering whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval); *Duffy v. Las Cruces Pub. Schools*, 557 F. Supp. 1013, 1016 (D.N.M. 1983) ("The ill lies in the public's *perception* of the moment of silence as a devotional exercise").

tional, a suggestion set forth in [Justice Stevens'] opinion as well." *Id.* at 62 (footnote omitted).

Given these three opinions, it appears to us that the Court is predisposed to believe that (1) there are valid pedagogical reasons for a moment of silence and such moments need not convey state encouragement of prayer; and (2) in practice, moment-of-silence statutes are, in fact, based on valid pedagogical considerations and in the classroom are not perceived as state encouragement of prayer. We could not agree more with the first proposition: there are myriad situations in which a teacher must have the pedagogical discretion to impose a moment of silence—for example, to restore order, to focus attention, or to prepare students for learning. Indeed, such moments are appropriate and must be available to teachers *throughout* the school day, not merely at the beginning of the first hour.

But our experience teaches us that the Court's second assumption is wrong. Even though moments of silence are a legitimate pedagogical tool and have been used for decades in our schools—both before and after this Court's school prayer decisions—the moments of silence *imposed* by state legislatures in the wake of those decisions are an entirely different proposition. Whatever facial purpose may have been invoked by the legislatures for the passage of such statutes, administrators, teachers, parents, and students understand those statutes as the legislatures' attempt to restore and encourage prayer in the classrooms.

Accordingly, because we believe the Court may have a misperception concerning the practical effect of those statutes, and because *Wallace* makes clear that the Court wishes to consider those practical effects in reviewing the constitutionality of such statutes, we summarize below our experience with them.

B. Classroom Perception of Moment-of-Silence Statutes

Twenty-five years ago this Court declared that state-sponsored Bible-reading or state-sponsored prayer recitation conducted as a brief exercise at the beginning of each school day violates the Establishment Clause. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). This was so in the case of prayer even though the prayer was "non-denominational" and its recitation by students was wholly voluntary; and this was so, in the case of Bible reading, even though the verses were read without comment and any student who wished could be excused from the reading. *Engel*, 370 U.S. at 430; *Schempp*, 374 U.S. at 205, 211. The Court treated these state-sponsored activities as unconstitutional even though they were brief and arguably were "relatively minor encroachments on the First Amendment." *Id.* at 225. Once the states had "us[ed] [their] public school system to encourage recitation of . . . prayer" or to encourage participation in a "religious exercise," they had "adopted . . . practice[s] wholly inconsistent with the Establishment Clause." *Engel*, 370 U.S. at 424; *Schempp*, 374 U.S. at 224. This Court therefore forbade them.

It is no secret to this Court—or to teachers and students—that significant disapproval, resistance, and attempted circumvention of *Engel* and *Schempp* continue to this day. In some instances, the resistance has taken the form of outright defiance in communities that continue to conduct prayer and devotional activities notwithstanding this Court's decisions.[3] In other instances, the

[3] For example, in 1981 this Court was called upon again to rule on a state statute allowing students to offer voluntary prayers at the beginning of the school day. *See Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982). Indeed, as the Court knows, *Wallace* itself was a case in which the district court expressly rejected this Court's views regarding school prayer. *See Wallace*, 472 U.S. at 45. In addition, various commentators have

resistance has taken the form of organized efforts to pass a constitutional amendment permitting voluntary school prayer.[4]

But by far the most significant and widespread reaction to the 1962 and 1963 decisions forbidding school-prayer exercises has been the adoption of moment-of-silence statutes in some 25 states across the country. Although the statutes vary somewhat from state to state, as Justice O'Connor explained in her *Wallace* opinion, they typically provide for a moment of silence at the beginning of the school day during which students may meditate, pray, or reflect. 472 U.S. at 72 (O'Connor, J., concurring in the judgment).

Several important points are well-known about these statutes. First, they all were passed in the wake of this Court's decisions banning school prayer.[5] That is to say, not one of the 25 legislatures thought a law mandating "*a moment of silence*" at the beginning of each day was necessary until this Court prohibited *a moment of prayer* at the beginning of each day. The apparent religious purpose of the moment-of-silence statutes is thus immediately "manifested" by their "sequence and history." *Wallace*, 472 U.S. at 65 (Powell, J., concurring).

---

offered anecdotal evidence concerning continuing prayer in the public schools. *See* Bacon, *Court Ruling Hasn't Quieted School Prayer*, U.S.A. Today, April 3, 1987, at 3A; Rosenbaum, *Prayer in Many Schoolrooms Continues Despite '62 Ruling*, N.Y. Times, March 11, 1984, at 1; Wermiel, *High Court's Rulings Against School Prayer are Often Violated*, Wall St. J., March 5, 1984, at 1.

[4] *See, e.g., Hearings, supra* p. 3; *Proposed Constitutional Amendment to Permit Voluntary Prayer: Hearings Before the Comm. on the Judiciary on S.J. Res. 199*, 97th Cong., 2nd Sess. (1982).

[5] Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 Harv. L. Rev. 1874, 1880 (1983).

Second, many of the statutes are ostensibly based on certain pedagogical values. Commonly cited values include the need for the students to quiet themselves, the need for introspection, and the need for a transition into the school day. Such values are, in fact, cited as a rationale for the statute in the present case.[6] Again, however, these are values that no legislature perceived as warranting a mandatory moment of silence until prayer exercises were prohibited by this Court's decisions.[7]

Third, many of the moment-of-silence statutes are also ostensibly premised on the need to "accommodate" those students who wish to pray. Those who suggest this premise contend that the statutes reflect a "hands-off" policy toward religion, simply permitting an opportunity for prayer for those students who wish to pray during the school day. Such an accommodation need is cited in the present case.[8] What is *not* cited is any basis for believing that without such a statute students in our nation's schools who *wish* to pray would have *no* available moment to do so.

The final point which we believe is well-known about these statutes is that, whatever purposes are cited by the legislatures, they were designed to serve a "hands-on" policy of encouraging prayer in the public schools. Be-

---

[6] Brief of Appellants at 41 (reciting New Jersey legislature's "purpose of providing public school students with a transition period at the commencement of the school day").

[7] Thus, appellants contend that the New Jersey statute requires only a "plausible" pedagogical purpose in order to withstand judicial scrutiny. Brief of Apellants at 29, 30, 36, 37. Appellants' emphasis on the statute's "plausible" purpose of course leaves open the issue of the statute's *genuine* purpose. *See* Brief for Appellees. In any event, whatever "plausible" purpose the statute may have had, this is a separate question from the *perceived* purpose in the classroom.

[8] *See* Brief for the United States as Amicus Curiae at 15.

fore *Engel* and *Schempp*, schools encouraged prayer by actually conducting a "moment of prayer"; now they encourage prayer through a state-mandated "moment of silence."[9] The Alabama legislature was imprudent enough to acknowledge this fact, and as a consequence, its statute was struck down. Other legislatures are more circumspect and so cite pedagogical values or "accommodation" needs to support their statutes. But we would suggest to the Court that the purpose of all such statutes is the same—to restore and encourage prayer in the public schools.[10]

Nevertheless, we do not purport in this brief to advise the Court concerning the "true purpose" of these statutes. It is not our business and is certainly no part of our expertise to second-guess the motives of state legislatures; legislators do what they feel they must to write laws that will both serve their constituents' demands and survive judicial scrutiny. But it *is* our business and part of our expertise to administer laws these legislatures make mandatory in the public schools. Based on that experience, we know how the vast majority of our school administrators and teachers perceive these laws; and we think we have a good understanding of how our students and their parents perceive them. Simply put, they are not fooled.

They know that a moment-of-silence statute is not necessary for a teacher to have the authority to call for

---

[9] As one commentator observed, the percentage of classrooms with explicit prayer practices decreased at the same time as the number of classrooms observing silent meditation increased. *See* Way, *Survey Research on Judicial Decisions: The Prayer and Bible Reading Cases*, 21 W. Pol. Q. 189, 190 n.6 (1968).

[10] Thus, the United States candidly acknowledges that "[t]he courts below were no doubt correct that the purpose of a 'moment of silence' statute has something to do with prayer." Brief for the United States as Amicus Curiae at 15; *see id.* at 17.

silence when true pedagogical reasons require it.[11] They know that such a statute is not necessary to permit prayer during the day by students who truly wish to pray.[12] And while their morning ritual once called "moment of prayer" is now called "moment of silence," they know that the essential content and intent of that moment have not changed.

This Court has repeatedly held—most recently in *Wallace* itself—that the state must maintain strict neutrality in matters of religion and, therefore, must take no action perceived as encouraging prayer in the public schools.[13] That is clearly how these moment-of-silence statutes are perceived in those schools. For example, one Long Island teacher characterized the debate over a moment of silence

---

[11] A teacher may call for a moment of silence at any time as required by a properly structured lesson plan. *See, e.g.*, Joint Appendix (hereinafter "J.A.") at 196, 220-221, 229 (testimony of Dr. Peter Kuriloff, Associate Professor of Education, University of Pennsylvania); Byrnes, *Life Skills in Solitude and Silence in the School*, 104 Educ. 96 (1983); Note, *Daily Moments of Silence in Public Schools: A Constitutional Analysis*, 58 N.Y.U.L. Rev. 364, 399 (1983). Intervenor-appellant Flanders thus is misguided in her assertion that she is precluded from calling for a moment of silence in her classroom in the absence of an authorizing state statute. *See* Brief for Intervenors-Appellants, App. 6a (Affidavit of Twylla Flanders).

[12] "Nothing in the United States Constitution as interpreted by this Court or in the laws of the State of Alabama prohibits public school students from voluntarily praying at any time before, during, or after the schoolday." *Wallace*, 472 U.S. at 67 (O'Connor, J., concurring in the judgment); *see Hearings, supra* p. 3, at 541 (statement of Ira J. Singer); J.A. at 249 (testimony of Dr. Houston, Superintendent of Princeton, New Jersey public schools).

[13] *Wallace*, 472 U.S. at 48-55; *Engel*, 370 U.S. at 436 ("governmental endorsement of that prayer seems relatively insignificant" but it is nevertheless unconstitutional); *Schempp*, 374 U.S. at 226 ("In the relationship between Man and religion, the State is firmly committed to a position of neutrality.").

as "Does God stay in Hicksville or does God go?" [14] Another teacher stated that a silent period, in effect, created a time for group prayer that "is absolutely inappropriate." [15] The Princeton, New Jersey superintendent testified that his impression of the New Jersey statute was that "it was essentially a way of putting prayer into the school setting in a way that would perhaps get around the original Supreme Court rulings." [16] This perception was shared by the teachers, students, administrators, and parents in the district; and members of the Board of Education personally opposed it for the same reason.[17]

In our judgment, these perceptions concerning the statutes were inevitable; and their tendency to encourage prayer by students who would not have otherwise prayed is also inevitable. Devout students will be unaffected because, as stated, those who wish to pray during the school day will find ample opportunity to do so, with or without a moment of silence. Similarly, students wholly opposed to praying will not do so, whether or not there is a moment of silence. But many—we would suggest most—students fall in between. They would not have prayed at school but for the fact that state law required their teacher to set aside a moment for them to do so if they chose. As this Court has said, students in our public schools are "impressionable" children.[18] When the state legislature conveys to those students that the opportunity

---

[14] *Silent Meditation Time Banned at School on L.I.*, N.Y. Times, March 2, 1984, at B2.

[15] Rosenbaum, *supra* note 3, at 32. The teacher explained that she was not concerned about students praying individually.

[16] J.A. at 229.

[17] *Id.* at 28 (Affidavit of Mark Tulloss), 39-40 (Affidavit of Jeffrey May), 43 (Affidavit of Rita Rothenberg), 234 (testimony of Dr. Houston), 377 (testimony of Dr. James Connerton).

[18] *Tilton v. Richardson*, 403 U.S. 672, 686 (1971); *accord, Wallace*, 472 U.S. at 81 (O'Connor, J., concurring).

for prayer is so important that a law requires the first moment of every school day to be set aside for that opportunity, they will be *encouraged* to pray. There is simply no doubt about that. This Court should acknowledge it to be so.[19]

C. Classroom Effects of Moment-of-Silence Statutes

Our concern with statutes such as the present one is not simply our opposition to a religious incursion in the classroom. We are concerned as well with the practical, detrimental effects such an incursion may bring. We wish to bring two such effects to the attention of the Court.

The first is the harm done to one of the most important values taught in public schools: the benefits and responsibilities of citizenship. This Court recognized in *Wallace* itself that a primary purpose of our public schools is to "educat[e] the young for citizenship." 473 U.S. at 61 n.51 (quoting *Board of Education v. Barnette*, 319 U.S. 624, 637 (1943)). One of the critical ways schools impart this education is when both by word and by deed they "scrupulous[ly] protect[] constitutional freedoms." *Id.* Such scrupulous protection is impossible if teachers are required, "[w]ith a wink and a nod," to lead their students in a "moment of silence" which they must describe as having a secular purpose. *Duffy*, 557 F. Supp. at 1023.

Worse, however, is the second harmful effect of these statutes—the divisiveness they bring to many of our nation's classrooms, particularly those where the diversity

---

[19] We repeat again that there *are* legitimate applications of a moment of silence in public schools, just as there *are* legitimate uses of the Ten Commandments and the Bible in public schools. *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam); *Schempp*, 374 U.S. at 225. But where the Ten Commandments, the Bible, or a state-mandated moment of silence are injected into the classroom in order to encourage or promote religious activity, they should be prohibited.

of religious beliefs is great. As the United States observes, "[o]urs is a nation of great religious diversity." Brief for the United States as Amicus Curiae at 16 n.13. In 1957, 66% of the population stated its religious preference as Protestant, 26% as Catholic, 3% as Jewish, 1% as other, and 3% as none. In 1985, 57% stated its religious preference as Protestant, 28% as Catholic, 2% as Jewish, 4% as other, and 9% as none.[20] The "none" and "other" categories increased from 4% of the population in 1957 to 13% in 1985. In the United States there are more than 289 denominations; Mormons outnumber Presbyterians; and there are almost equal numbers of Episcopalians and Moslems.[21]

Contrary to the unsupported assertion of the United States that the moment of silence fosters " 'harmony and tolerance among the pupils' ",[22] our experience teaches that what is actually fostered is divisiveness. A mandatory moment of silence for prayer or meditation is simply ill-suited to our religiously diverse classrooms. A moment of silence, after all, is a particularly Christian form of prayer,[23] and it is held at the traditional time for Christian prayer, the beginning of the day. But other religions

---

[20] Bureau of the Census, U.S. Dept. of Commerce, *Statistical Abstract of the United States: 1987* 53, No. 76 (107th ed.).

[21] AASA, *Religion in the Public Schools* 3 (1986) (citing *Handbook of Denominations in the United States* (1975); *1985 Yearbook of American and Canadian Churches*). The superintendent of the Princeton, New Jersey school system testified in this case that his school district has Catholic, Protestant and Jewish students, as well as students from over 40 countries, representing "the other major religions in the world . . . ." J.A. at 227-228.

[22] Brief for the United States as Amicus Curiae at 16 n.13 (citing *Schempp*, 374 U.S. at 280 (Brennan, J., concurring)).

[23] J.A. at 143 (testimony of Dr. Langdon Gilkey, a Baptist minister and theology professor at the University of Chicago Divinity School). *See* Note, *supra* note 5, at 1886 n.76 (suggesting a moment of silence is "designed for the repetition of a verse the length of the Lord's prayer").

pray or meditate in different ways. As the district court noted:

> In the traditional American culture silence, bowing one's head and clasping one's hands is associated with prayer. This reflects the development of Protestantism, Reform Judaism and Catholicism. Historically, however, Catholics kneeled and Jews raised their hands. Members of the Islamic faith may kneel on prayer rugs[;] . . . [f]or Quakers silence itself is prayer.

May v. Cooperman, 572 F. Supp. 1561, 1569 (1983), *aff'd*, 780 F.2d 240 (3d. Cir. 1985), *juris. postponed sub nom. Karcher v. May*, 107 S. Ct. 946 (U.S. Jan. 27, 1987) (No. 85-1551).[24]

To bring into the classroom a moment of silence that tends to facilitate (if not encourage) Christian prayer is more than simply offensive and unfair to non-Christians; and it does not "put[] religion on a wholly voluntary basis." Brief for the United States as Amicus Curiae at 21. Instead, it will often subtly pressure many non-Christian students to conform their behavior to the "norm" of Christianity. In the classroom, "[t]he law of imitation operates, and non-conformity is not an outstanding characteristic of children." *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 227 (1948) (Frankfurter, J., concurring); *accord*, *Duffy*, 557 F. Supp. at 1016 ("As established by Gorden Cawelti, an expert in the fields of curriculum and discipline, children are extremely impressionable and easily influenced").

For example, in a West Virginia schoolroom one Jewish student read a science-fiction book during a moment of silence.[25] In the second period of the day a classmate

---

[24] *See* J.A. at 32-33 (Affidavit of Rev. Dr. George Younger), 143-44, 159 (testimony of Dr. Langdon Gilkey).

[25] *Walter v. West Virginia Bd. of Educ.*, 610 F. Supp. 1169, 1171 (D. W. Va. 1985) (statute authorized "contemplation, meditation, and prayer").

asked him why he had not been praying during the moment of silence. A second classmate then asked why the Christian student was bothering, because the nonpraying classmate was Jewish and the Jews had murdered Christ. The child felt "hurt, then I felt angry because I didn't think it was fair that he should be able to say things like that during school . . . ." [26] The Jewish student was too frightened of " 'bad publicity' " to tell his teacher.[27]

Similarly, the parent of a New Jersey student stated that she wanted her child to leave the classroom during the moment of silence because she viewed it as prayer in the classroom; but she was "fully aware of the peer pressure placed upon him . . . and . . . sensitive to his feelings that he will be singled out if he does not participate." [28] A Chicago student said that students who did not pray during moments of silence "might be embarrassed. But then they, especially your good friends, would begin to go along with you and pray . . . ." [29]

These examples illustrate the harmful effects of moment-of-silence statutes and their tendency to bring "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion . . . ." *Engel*, 370 U.S. at 431.[30] Such coercive, divisive

---

[26] *Id.* at 1172.

[27] *Id.* at 1173.

[28] J.A. at 42, 43 (Affidavit of Rita Rothenberg). *See also* J.A. at 29-30 (Affidavit of Jean Ross).

[29] Rosenbaum, *supra* note 3, at 32. *See also* J.A. at 32-33 (Affidavit of Rev. Dr. George Younger) ("as a practical matter" many students observing statutory moments of silence "will feel compelled to pray").

[30] Moreover, where non-Christian students resist this pressure and use the "moment of silence" for their own chosen form of prayer—which may involve loud noises, gestures, or moving about the room—the teacher then "must either allow such actions or stop them—an untenable and inappropriate responsibility either way." *Hearings, supra* p. 3, at 541 (statement of Ira J. Singer).

influences have no place in our nation's classrooms. Teachers should not be asked to lead and students should not be asked to participate in "moments" that in no way contribute to the mission of our public schools.

Mr. Justice Clark wrote for the Court in *Schempp* that "[t]he place of religion in our society is an exalted one, achieved through a long tradition of reliance on *the home, the church*, and the inviolable citadel of *the individual heart and mind.*" 374 U.S. at 226 (emphasis added). Yet these moment-of-silence statutes operate to keep religious worship *in the schools* as well, a place where it does not belong and where its effects are detrimental to the educational process. This Court should so rule in this case.

CONCLUSION

For the reasons discussed above, amicus curiae American Association of School Administrators urges this Court to affirm the judgment below.

Respectfully submitted,

DAVID S. TATEL
WALTER A. SMITH, JR.*
ELIZABETH B. HEFFERNAN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
Counsel for
American Association
of School Administrators

* Counsel of Record

Dated: Washington, D.C.
May 28, 1987